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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No.
~~377~~

ANTHONY S. NOGA, Special Administrator of the Estate of Peter Anthony Noga, Deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

JAMES C. HAGEDORN,
JAMES D. MART,
703 Market Street,
San Francisco, California 94103,
Attorneys for Petitioner.

HOBERG, FINGER, BROWN & ABRAMSON,
703 Market Street,
San Francisco, California 94103,
Of Counsel.

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In the Supreme Court
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No.

ANTHONY S. NOGA, Special Administrator of the Estate of Peter Anthony Noga, Deceased,

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on April 25, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 96-99) is reported at 272 F.Supp. 51. The opinion of the Circuit Court of Appeals is printed in Appendix B, *infra*.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 25, 1969. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The Ninth Circuit has construed the Federal Employees Compensation Act, 5 U.S.C. Supp. II (1967), §8116(c), and the Federal Drivers' Act, 28 U.S.C. §§2679(b)-(e) (1964), to bar a tort action by an injured federal employee against either a negligent fellow employee (by applying the exclusive remedy provision of the Federal Drivers' Act) or against the United States (by applying the exclusive remedy provision of the Federal Employees Compensation Act), where the cause of action is based upon the negligent operation of a motor vehicle by the fellow federal employee. The questions presented are:

1. Is the statutory interpretation correct; and

2. Do the statutes, as interpreted by the Ninth Circuit, deprive the petitioner of a cause of action without due process of law and deny him the equal

protection of the laws in violation of the Fifth Amendment to the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are §8116(c) of the Federal Employees Compensation Act, 80 Stat. 542, 5 U.S.C. §8116(c), and the Federal Drivers' Act, 75 Stat. 539, 28 U.S.C. §2679(b)-(e) (1964). They are printed in Appendix A, *infra*.

The constitutional provision involved is the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Peter Anthony Noga brought suit against the United States for damages for personal injuries sustained in an automobile collision caused by the negligence of the federal driver of the vehicle in which Noga was riding. Both Peter Noga and the driver were government employees, acting within the course and scope of their federal employment. The jurisdiction of the District Court was invoked because the claim arose under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 (1964). The United States' Motion for Summary Judgment was granted on the grounds that the exclusive remedy against the United States by a federal employee for personal injuries sustained in the performance of his duties, as the

result of the negligence of a fellow employee, was under the F.E.C.A. An appeal was taken to the Ninth Circuit where the judgment of the District Court was affirmed. While the case was pending before the Ninth Circuit, Peter Anthony Noga died as a result of his injuries and Anthony S. Noga, Special Administrator of the Estate of Peter Anthony Noga, was substituted as plaintiff and appellant.

REASONS FOR GRANTING WRIT

Prior to the enactment of the Federal Employees Compensation Act, 5 U.S.C. §§751, et seq. (now 5 U.S.C. §§8101, et seq.), a person injured by the negligence of a federal employee had only a common law cause of action against the negligent employee. Upon the enactment of F.E.C.A. in 1916, a federal employee injured by a fellow employee had both a cause of action against the negligent employee and also the right to receive F.E.C.A. benefits. *Allman v. Hanley*, 302 F.2d 599 (5th Cir. 1962). In 1946, Congress abrogated the sovereign immunity protection by the enactment of the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-80 (1964), providing a tort remedy against the United States. In 1949, Congress added a section to the F.E.C.A. specifically providing that the compensation remedy shall be the exclusive remedy against the United States for injuries sustained by federal employees in the performance of their duties. See 63 Stat. 861, 5 U.S.C. §757(b) (now 5 U.S.C. §8116(c)). The passage of the Federal Driv-

ers' Act, 28 U.S.C. §§2679(b)-(e) (1961), made the tort remedy against the United States exclusive for members of the public injured by the negligent operation of a motor vehicle by a federal employee. The United States was substituted as a defendant in place of the employee. See *Perez v. United States,* 218 F. Supp. 571 (S.D.N.Y. 1963); *Gustafson v. Peck,* 216 F.Supp. 270 (N.D. Iowa 1963). Before the enactment of the Federal Drivers' Act all members of the public, including injured federal employees, had a common law remedy in tort against a negligent federal driver. *Allman v. Hanley, supra; Marion v. United States,* 214 F.Supp. 320 (D. Md. 1963).

The clear intent of Congress in enacting the Federal Drivers' Act is to protect the federal driver from financial disaster by shifting the responsibility from the driver to the federal government while not depriving injured persons of their remedies for injuries. S. Rep. No. 736, 87th Cong., 1st Sess., p. 1. Congress did not at any time express the intent to deprive an injured federal employee who had received compensation under the F.E.C.A. of his tort remedy against his fellow employee for the negligent operation of a motor vehicle.

Thus, an issue of statutory interpretation and construction is raised. Three interpretations of these statutes are possible:

1. The federal employee can recover from the United States (by not applying the exclusive remedy provision of the F.E.C.A.), but cannot recover from the federal employee (by applying the exclusive rem-

edy provision of the Federal Drivers' Act). This substitutes the United States as a defendant in place of the federal driver.

2. The federal employee cannot recover from the United States (by applying the exclusive remedy provision of the F.E.C.A.), or from the fellow employee (by applying the Federal Drivers' Act). This abolishes the judicial remedy in tort.

3. The federal employee can recover from his fellow employee (by not applying the exclusive remedy provision of the Federal Drivers' Act), but cannot recover from the United States (by applying the exclusive remedy provisions of the F.E.C.A.). This fails to carry out the purpose of the Federal Drivers' Act.

The best construction and interpretation must be the one that carries out the purpose of the Federal Drivers' Act protecting federal drivers, while at the same time preserving to the injured federal employee the judicial remedy in tort. Only the first construction accomplishes this. The second construction, adopted by the Ninth Circuit in this case and in *Van Houten v. Ralls*, No. 22356, April 25, 1969, and by the Sixth Circuit in *Gilliam v. United States*, 407 F.2d 818 (Feb. 10, 1969), and *Vantrease v. United States*, 400 F.2d 583 (1968), fall short of constitutional minimums and should be rejected.[1]

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[1]See also *Beechnut v. United States*, 264 F.Supp. 926 (D. Mont. 1967). The only other case directly in point which petitioner has been able to find is *Green v. Short*, No. 1107 (E. D. Ky.), (unreported), quoted in *Gilliam v. United States*, 264 F. Supp. 7 (E. D. Ky. 1967).

The primary reason for rejecting the result of the Ninth and Sixth Circuits, as expressed by Judge Combs in his concurring opinion in *Gilliam v. United States, supra,* at 819, is that by applying the exclusive remedy provision of the F.E.C.A., an unjust and chance result is imposed on federal employees who have the misfortune to be injured in a vehicular accident. Suits are permitted by federal employees against fellow employees in non-vehicular accidents.

A construction of the F.E.C.A. that does not apply the exclusive remedy provision to cases arising under the Federal Drivers' Act would protect federal drivers, as Congress intended by shifting financial responsibility to the United States and would avoid depriving the injured federal employee of his judicial tort remedy. Precedent for such judicial construction is found in the recent Supreme Court decisions of *Jackson v. Lyte Steamship Co.,* 386 U.S. 731 (1967), and *Reed v. Steamship Yaka,* 373 U.S. 410 (1963). Construction of a similar "exclusive remedy" provision in a workman's compensation type of statute was rejected in both cases so as to avoid an incongruous, absurd and unjust result. The traditional cause of action for unseaworthiness was thus preserved.

If the decision in *Noga* is permitted to stand, it would violate the Constitutional guarantees of due process and equal protection under the Fifth Amendment to the Federal Constitution. The court's interpretation of the Federal Drivers' Act fails to provide a remedy for all federal employees by discriminating against those employees who are injured by a vehicle

as distinguished from any other negligent act. Unconstitutionality is not present where the injured person is not a federal employee, because in that case there is a substantial and equivalent remedy in tort provided against the United States. See *Richmond Screw Anchor Co. v. United States,* 275 U.S. 331 (1928). See, e.g., *Uptagrafft v. United States,* 315 F.2d 200, cert. den. 375 U.S. 818. An unconstitutional interpretation can be avoided by not applying the exclusive remedy provision of the F.E.C.A. to cases under the Federal Drivers' Act. This would provide a just and substantial equivalent, namely, the substitute action against the United States as defendant in place of the action against the federal driver.[2]

A construction that bars recovery against both the United States and the negligent federal driver is contrary to the long-standing principle that the abrogation of common law rights is best left to Congress. The courts should not annul these rights where Congress is silent on the subject. *Allman v. Hanley, supra,* and *Marion v. United States, supra.* It must be stressed that Congress has remained silent and has not amended the federal compensation statutes to abrogate the common law remedy against the fellow federal employee. It would be a simple matter to place such restrictive language in the statute.

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[2]The Ninth Circuit stated at p. 4 of the *Noga* opinion (Appendix B, *infra*) that the issue of due process was not present since petitioner did not sue the driver. However, the futility of this is demonstrated by the companion case of *Van Houten v. Ralls* (Appendix B, *infra*) decided by the Ninth Circuit on the same day.

This question is of great urgency and importance because of the large numbers of federal employees who are affected. The growing number of auto collisions and the need to compensate the victims is of grave national concern. The F.E.C.A. remedy is incomplete and inadequate. To illustrate: the record herein shows that from 8/24/64 through 7/31/66, plaintiff received benefits of $56.61 per week, totalling $4,186.61 (R. 11). Such sum is far from adequate compensation for our quadraplegic federal employee.

Furthermore, F.E.C.A. requires that the injured employee visit federal doctors and use federal medical facilities. 5 U.S.C. §8103. These facilities are often overcrowded and understaffed so that the medical treatment received by an injured employee is far inferior to that which he needs and could obtain from private hospitals. The public interest would be best served if the construction of these statutes is finally resolved by this Court. The question here presented is certain to arise again and again as other federal employees sustain injuries by automobiles and complain of this unjust discrimination.

CONCLUSION

It is respectfully submitted that an incongruous, unconstitutional and unjust result can be avoided by permitting petitioner to proceed directly against the United States to be substituted as the defendant in

place of the federal driver. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES C. HAGEDORN,

JAMES D. MART,

Attorneys for Petitioner.

HOBERG, FINGER, BROWN & ABRAMSON,

Of Counsel.

July 18, 1969.

(Appendices Follow)

Appendix A

5 U.S.C. § 8116

§ 8116. *Limitations on right to receive compensation*

(a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except—

(1) in return for service actually performed; and

(2) pension for service in the Army, Navy, or Air Force.

However, eligibility for or receipt of benefits under subchapter III of chapter 83 of this title, or another retirement system for employees of the Government, does not impair the right of the employee to compensation for scheduled disabilities specified by section 8107(c) of this title.

(b) An individual entitled to benefits under this subchapter because of his injury, or because of the death of an employee, who also is entitled to receive from the United States under a provision of statute other than this subchapter payments or benefits for that injury or death (except proceeds of an insurance policy), because of service by him (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he will re-

ceive. The individual shall make the election within 1 year after the injury or death or within a further time allowed for good cause by the Secretary of Labor. The election when made is irrevocable, except as otherwise provided by statute.

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 542; Pub.L. 90-83, § 1(56), Sept. 11, 1967, 81 Stat. 210.

28 U.S.C. § 2679

§ 2679. *Exclusiveness of remedy*

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing

the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75 Stat. 539.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 22,165

Anthony F. Noga, Special Administrator of the Estate of Peter Anthony Noga, Deceased,
Appellant,
vs.
United States of America,
Appellee.

[April 25, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: Hamley, Merrill and Browning,
Circuit Judges

Hamley, Circuit Judge:

Peter Anthony Noga brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1964). He sought damages for grievous personal injuries, from which he later died, sustained in an automobile accident. According to the complaint, the collision was caused

by the negligence of the driver of the vehicle in which he was riding. The driver was a Government employee then acting within the scope of his employment.

The United States moved for summary judgment dismissing the action. The Government pointed out that plaintiff Noga was himself a Government employee acting within the scope of his employment at the time of the accident and asserted that his sole remedy against the Government is therefore under the federal employees compensation system.[1] The motion was granted, the action was dismissed and plaintiff appeals.

Prior to the enactment, in 1961, of the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1964), the exclusive remedy against the United States by a civilian employee for personal injuries sustained in the performance of his duties, as the result of the negligence of a fellow employee, was under the FECA.[2] But such

[1]The compensation system referred to is that provided by the Federal Employees Compensation Act (FECA), 5 U.S.C. (Supp. II) (1967), §§ 8101 et seq. Plaintiff Noga had applied for and received compensation for his injuries under FECA, in the amount of $4,189.61 for the pedriod covering August 25, 1964 through July 31, 1966. The minimum rate for total disability, beginning August 1, 1966, was $56.61 per week. Noga received this amount or more under FECA until his death on March 24, 1968. The special administrator of his estate was thereafter substituted for Noga in these court proceedings.

[2]The exclusivity provision of FECA, 5 U.S.C. (Supp. II) (1967) § 8116(c), reads:

> "(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the

injured civilian employee of the Government did have, prior to 1961, a common law tort remedy against the negligent fellow employee. See *Allman v. Hanley,* 5 Cir., 302 F.2d 559, 563.

The Federal Drivers Act was enacted to provide a method for the assumption by the Federal Government of responsibility for damage claims against its employees arising from their operation of motor vehicles while in the scope of Government employment. See S.Rept. No. 736, 87th Cong., 1st Sess., 2 U.S. Code Cong. and Admin. News 1961, page 2785. The statute accomplishes that purpose by immunizing individual federal drivers from personal suits and judgments arising out of accidents caused by their negligence. In lieu thereof, the Federal Drivers Act limits the plaintiff to his remedy against the United States under the Federal Tort Claims Act.[3]

If the exclusivity provision of the FECA, quoted in note 2, is applied, however, the Federal Drivers

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United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proproceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel."

[3]Section 2679(b), as amended, 80 Stat. 307 (1966), 28 U.S.C. (Supp. II) § 2679(b) reads:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Act remedy is not available if the plaintiff is himself a federal employee acting within the scope of his employment. Noga would avoid this result by disregarding the exclusivity provision of FECA where the tortfeasor is a Government employee acting within the scope of his employment. Noga would, in these circumstances, characterize the United States as a technical defendant substituted in place of the negligent federal driver.

We do not believe plaintiff's proposed solution is permissible under the exclusivity provision of the FECA. The statutory language, quoted in note 2, is not ambiguous. It states that the United States is not liable under the FECA and the Federal Tort Claims Act, but only under the FECA. This provision was not tampered with in the Federal Drivers Act.[4] We therefore see no room for a construction of these Acts which, contrary to the exclusivity provision of the FECA, would give federal employees another remedy against the Government where the tortfeasor is covered by the Federal Drivers Act.

We do not believe that the Supreme Court decisions cited by plaintiff require a different reading of congressional intent. The cases of *Jackson v. Lykes Steamship Co.*, 386 U.S. 731, and *Reed v. SS Yaka*, 373 U.S. 410, not only involved considerations peculiar to the law of admiralty, but also dealt solely with the rights of maritime employees against their private

[4]We note that, in the course of recodifying Title 5 of U.S.C., this exclusivity provision was reënacted on September 6, 1966, five years after the original enactment of the Federal Drivers Act. See 80 Stat. 542 (1966).

employers. With regard to the rights of maritime employees of the United States, the Supreme Court has held that the FECA provides the sole and exclusive remedy against the Government. *Patterson v. United States,* 359 U.S. 495; *Johansen v. United States,* 343 U.S. 427.[5]

Plaintiff argues that if the Federal Drivers Act is construed as barring recovery by him on the basis of common law tort from both the United States and the negligent fellow employee, he will be deprived of due process of law as guaranteed by the Fifth Amendment.

In this case plaintiff Noga sued only the United States. There has never been a common law right by an injured person, Government employee or otherwise, to recover damages from the United States by reason of the negligence of a Government employee. Therefore, neither the Federal Drivers Act nor the FECA deprived plaintiff of a preexisting common law remedy against the Government. Whether the Federal Drivers Act, in insulating federal drivers from a preëxisting common law right of action for damages brought by a fellow employee, constitutes a deprivation of due process, is a question not presented here since Noga did not sue the driver.

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[5]The continued vitality of the *Patterson* and *Johansen* decisions is demonstrated by the Supreme Court's decisions in *United States v. Demko,* 385 U.S. 149, 151-152 and *Amell v. United States,* 384 U.S. 158, 160-161. Moreover, in *Aho v. United States,* 5 Cir., 374 F.2d 885, the Fifth Circuit rejected the contention plaintiff here advances, holding that the *YAKA* case did not apply to Government seamen.

The result we reach in this case is in accord with that recently reached in two cases before the Sixth Circuit. See *Gilliam v. United States,* 6 Cir., ... F.2d ....., decided February 10, 1969; *Vantrease v. United States,* 6 Cir., 400 F.2d 853. See also, *Van Houten v. Ralls* and *Byington,* 9 Cir., ... F.2d ....., filed today.

Affirmed.

United States Court of Appeals
for the Ninth Circuit

No. 22,356

John C. Van Houten,
Appellant,
vs.
Ray Arthur Ralls and
Gerald L. Byington,
Appellees.

[April 25, 1969]

Appeal from the United States District Court
for the District of Nevada

Before: Hamley, Merrill and Browning,
Circuit Judges

Hamley, Circuit Judge:

John C. Van Houten commenced a suit against the United States and two employees of the federal Government in the United States District Court for the District of Nevada. He sought to recover damages for injuries sustained when an automobile in which he was riding as a passenger collided with another vehicle due to the alleged negligence of both drivers. Both drivers, Ray Arthur Ralls and Gerald L. Bying-

ton, and Van Houten himself, were employees of the United States acting within the scope of their employment at the time of the accident. Insofar as the United States was concerned, subject-matter jurisdiction was asserted under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1964), and the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1964).

The Government moved for summary judgment dismissing the action as to the United States on the ground that, as a Government employee injured during the course of his employment, Van Houten's sole remedy against the United States was his right to benefits under the Federal Employees Compensation Act (FECA), 5 U.S.C. (Supp. II) (1967) §§ 8101 et seq.[1] A motion was also made to dismiss the action as to the personal defendants on the ground that the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1964), prohibits a civil action in any court against federal drivers for injuries caused by the negligence of such drivers while acting within the course of their Government employment.

The district court granted the motion for summary judgment and dismissed the action as to the United States. The court also granted the motion to dismiss the action as to the personal defendants, but not on the Federal Drivers Act ground referred to above. The court dismissed the action as to those defendants

[1]The particular provision of FECA which makes benefits thereunder the exclusive remedy available to federal employees against the United States for injuries sustained in the course of employment is 5 U.S.C. (Supp. II) (1967) § 8116(c).

for lack of diversity jurisdiction. However, the court expressed the opinion that an action against the individual drivers in an appropriate state court is not barred by the Federal Drivers Act, in view of the unavailability of a tort remedy against the United States.

Van Houten did not appeal from the judgment of dismissal. Instead, he commenced the action now before us in a Nevada state court. Seeking damages for personal injuries sustained in the accident referred to above, he named as defendants the two drivers, Ralls and Byington. Upon the certification of the United States, the action was removed to the United States District Court for the District of Nevada, pursuant to 28 U.S.C. § 2679(d) (1964), a provision of the Federal Drivers Act.[2]

Plaintiff then moved to remand the cause back to the state court, arguing that a remedy by suit within the meaning of 28 U.S.C. § 2679(b) is not available

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[2]Section 2679(d) reads:

"(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title [Federal Tort Claims Act] and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

against the United States.[3] Plaintiff called attention to the fact that the last sentence of 28 U.S.C. § 2679(d) under which the remand from the state court to the federal court was obtained (quoted in note 2), provides that if it should be determined that the case is one in which a remedy by suit is not available against the United States, "the case shall be remanded to the State court." As before noted, the unavailability of a direct remedy against the United States had already been established in Van Houten's prior action against the United States.

Defendants (in actuality the United States as substituted defendant) countered with a motion to dismiss the action. They argued, among other things, that a remand to the state court would destroy the protection which Congress intended to give federal drivers under the Federal Drivers Act.

The district court accepted this reasoning and granted defendants' motion to dismiss. It thereby implicitly denied plaintiff's motion to remand back to the state court. In doing so, the court concluded that its earlier expression of opinion that the Federal Drivers Act did not bar a state court action against

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[3]Section 2679(b), as amended, 80 Stat. 307 (1966), 28 U.S.C. (Supp. II) § 2679(b) reads:

"(b) The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

the personal defendants was in error. This appeal followed.

The district court correctly ruled that, under the circumstances of this case, the remand provision of the Federal Drivers Act did not call for retransfer of the suit to the state court. The remand provision (see note 2) is applicable only where the Government driver is found to have been acting outside the scope of his employment at the time of the accident. *Vantrease v. United States*, 6 Cir., 400 F.2d 853, 855.

The other contentions advanced by Van Houten on this appeal were also dealt with and rejected in *Vantrease*.[4] We are in agreement with the reasoning of the Sixth Circuit in that opinion. The federal legislative objective in enacting the Federal Drivers Act while leaving the exclusivity provision of the FECA intact was apparently to protect federal drivers from personal liability by rendering the Government liable in tort, in the case of non-federal employee plaintiffs, and by rendering the Government liable only under the FECA in the case of federal employee plaintiffs.

Van Houten has raised no due process question in this litigation.

Affirmed.

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[4]On other aspects of this general problem see *Noga v. United States*, 9 Cir., ... F.2d ....., decided today, and *Gilliam v. United States*, 6 Cir., ... F.2d ....., decided February 10, 1969.